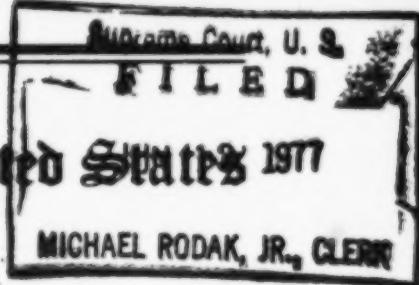


IN THE
Supreme Court of the United States
OCTOBER TERM, 1976



No. 76-5761

**MICHAEL LEE SIMPSON AND
TOMMY WAYNE SIMPSON,**

Petitioners,

v.

UNITED STATES OF AMERICA.

No. 76-5796

MICHAEL LEE SIMPSON,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

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Allowing a court to impose sentences for an aggravated bank robbery conviction, 18 U.S.C. §2113(d) and use of a firearm to commit a felony, 18 U.S.C. §924(c)(1), when both convictions result from the same set of factual circumstances amounts to duplicitous sentencing and should be prohibited.....	4
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OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and may be found in the joint Appendix (Page 29). The opinion denying the petition for rehearing is also unreported and may be found in the joint Appendix (Page 31).

JURISDICTION

The judgment of the Court of Appeals was rendered on October 14, 1976. The petition for rehearing was denied on November 9, 1976. The petitions for certiorari and motions to proceed in forma pauperis were filed November 26, 1976 and December 3, 1976, and granted April 18, 1977.

QUESTION PRESENTED

Whether both a conviction and sentence for aggravated bank robbery under 18 U.S.C. § 2113(d) and a conviction and sentence for use of a firearm during the commission of a felony under 18 U.S.C. § 924(c) can be assessed when both convictions and sentences resulted from the same set of factual circumstances?

STATUTES INVOLVED

Title 18 U.S.C. §2113(d):

"Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than \$10,000 or imprisoned not more than twenty-five years, or both."

Title 18 U.S.C. §924(c);

"Whoever-

- (1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or
- (2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States.

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony."

STATEMENT OF THE CASE

The petitioners were convicted on February 2 and February 24, 1976, United States District Court for the Eastern District of Kentucky for two (2) separate armed bank robberies in violation of 18 U.S.C. §2113(d). At the same time they were convicted for the offense of using a firearm to commit a felony in violation of 18 U.S.C. §924(c). The Court sentenced each petitioner to twenty-five (25) years for each bank robbery and to ten (10) years for each firearm felony, all sentences to be served consecutively. The proof at trial demonstrated that the petitioners flourished handguns during the commission of the bank robberies. The bank robberies were the felonies to which the firearm convictions pertained.

Timely notices of appeal were filed and the cases were presented to the United States Court of Appeals for the Sixth Circuit. On October 14, 1976, after consolidating the cases, the

United States Court of Appeals for the Sixth Circuit entered an order affirming the decision of the lower court. A timely petition for rehearing was filed and the United States Court of Appeals for the Sixth Circuit denied same on November 9, 1976.

Timely petitions for certiorari were filed along with motions of the petitioners for leave to proceed in forma pauperis on November 26, 1976 and December 3, 1976. On April 18, 1977, the Supreme Court of the United States granted petitioners' motions for leave to proceed in forma pauperis and petitions for writ of certiorari.

ARGUMENT

ALLOWING A COURT TO IMPOSE SENTENCES FOR AN AGGRAVATED BANK ROBBERY CONVICTION 18 U.S.C. §2113(d) AND USE OF A FIREARM TO COMMIT A FELONY 18 U.S.C. §924(c) WHEN BOTH CONVICTIONS RESULT FROM THE SAME SET OF FACTUAL CIRCUMSTANCES AMOUNTS TO DUPLICITOUS SENTENCING AND SHOULD BE PROHIBITED.

The legislative history of 18 U.S.C. §924(c) indicates that the purpose of the statute is to deter the use and carrying of firearms in the commission of felonies against the laws of the United States. Congress intended that additional punishment be authorized when a firearm is used in the commission of a felony, however, the legislative history clearly demonstrates that where the statute charging the substantive crime includes a provision which provides a higher penalty for use of a dangerous weapon or firearm, §924(c) is not applicable. Obviously, in such a situation, the deterrent function of §924(c) is served by the statute charging the substantive crime.

The remarks of Representative Poff, §924(c)'s sponsor, during the House Committee Hearing on the statute include the following:

"My substitute makes it a separate federal crime to use a firearm in the commission of another federal crime and invokes separate and supplemental penalties." *114 Congressional Record*, 2231.

"The affect of a minimum mandatory sentence. . . is to persuade the man who is tempted to commit a federal felony to leave his gun at home." *114 Congressional Record*, 2231.

From these comments it is clear that the statute's sponsor believed that imposition of a separate and supplemental penalty for felonies committed with a firearm would deter the use of firearms.

Representative Poff went on to state:

"For the sake of legislative history, it should be noted that my substitute is not intended to apply to Title 18 §111, 112 or 113 which already define the penalties for use of a firearm in assaulting officials, with §2113 or 2114 concerning armed robberies of the mail or bank. With §2231 concerning armed assaults upon process servers or Chapter 44 which defines other firearm felonies." *114 Congressional Record*, 2232, *emphasis added*.

If the purpose of §924(c) is, as stated by Representative Poff, to deter the use of a firearm in the commission of a felony, that purpose is nullified when the substantive offense provides enhanced punishment for the use of a dangerous weapon or device which necessarily includes a firearm.

In *United States v. Eagle*, 539 F.2d 1166 (8th Cir. 1976) the Court held that where the statute controlling the charged crime enhances penalty for use of a dangerous weapon, then §924(c) cannot be joined in the indictment. In *Eagle* the appellant was charged under 18 U.S.C. §1153 for an assault with a deadly weapon against an Indian in Indian country. The Court of Appeals concluded that §1153 was the same type of statute as those excluded from use with §924(c) by Representative Poff, *supra* *114 Congressional Record*, 2232, and therefore held that the appellant's conviction under §924(c) be vacated. In reaching its decision the Court of Appeals for the Eighth Circuit reasoned:

"Appellant contends that although the statutory language is broad ('any felony'), Congress did not in fact intend that a prosecution for violating §924(c) would be available where the underlying felony is that charged here, an assault with a dangerous weapon in violation of 18 U.S.C. §1153, the Major Crimes Act. We agree, and so vacate the Count 11 conviction. Page 1171.

We reach this result first because §1153 itself provides an increased penalty for use of a dangerous weapon. We are convinced that Congress did not intend §924(c)(1) to be applicable in a case involving such a statute.

We are led to the conclusion by the legislative history of §924(c)(1).

It is not necessary to deterrence to impose an increased penalty for use of a firearm by separate statute, when the substantive statute itself does so. Page 1172.

The existing statutes, by providing federal sanctions only if firearms are used, perform the function of deterrence. Application of §924(c)(1) to the crime is not necessary, and apparently was not intended by Congress." Page 1172.

A contrary result was reached by the Court of Appeals for the Fifth Circuit in *United States v. Perkins*, 526 F.2d 688 (5th Cir. 1976). In *Perkins* the Court upheld a conviction for §924(c)(2) when joined with a prosecution under §2113(d). The Court found that the elements of §2113(d) were different from those in §924(c)(2) and stated:

"To convict for a violation of §924(c)(2), the Government must prove, in *addition* to the elements necessary to prove a violation of §2113(a) and (d), that appellant carried a *firearm*, not just a dangerous weapon, and that he carried it *unlawfully*. The elements of 'firearm' and 'unlawfully' are unique to the §924(c)(2) count. Unlawfulness is not an element of §2113(d) and §2113(d)'s element of a dangerous weapon may consist of various instruments, only one of which is a firearm. The fact that a firearm happened to be the dangerous weapon in this particular case does not alter the fact that 'firearm' and 'dangerous weapon' are not coterminous elements." 526 F.2d at 690.

Similarly, in *United States v. Crew*, 538 F.2d 575 (4th Cir. 1976), the Court of Appeals for the Fourth Circuit held that consecutive sentences under §924(c) and §2113(d) were proper because the offenses were not identical and required proof of distinguishable elements; that a firearm as opposed to a dangerous weapon or device was carried or used.

To hold that §924(c) and §2113(d) do not contain coterminous elements because of the use of the word "firearm" as opposed to "dangerous weapon" or "device" is a tenuous sematical argument. Certainly it cannot be gainsaid that Congress intended the words "dangerous weapon" or "device" as used in §2113(d) to include "firearms". *Baker v. United States*, 412 F.2d 1069 (5th Cir. 1969).

Assuming arguendo that there is a valid distinction, no matter how thin, between the words "firearm" and "dangerous weapon", the indictments in the case at bar use the following language:

2113(d) -

"... by use of dangerous weapons, to wit, handguns." (App. 2, 4)

924(c)(1) -

"... used firearms, to wit, handguns, to commit a felony. . ." (App. 3, 5)

Therefore any possible distinction was removed by virtue of the actual words in the indictments. Since the definitions of a "dangerous weapon" and a "firearm" became coterminous by the wordage of the indictments, the elements to prove each offense became identical. Thus the dictates as set forth in *Blockburger v. United States*, 284 U.S. 259 (1932) wherein this court stated:

"[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." (284 U.S. at 304)

become applicable. Once the government had shown that the bank robbery had been committed and that a handgun had been used to commit the crime, all elements of both crimes were satisfied.

CONCLUSION

The legislative history of §924(c) demonstrates that Congress did not intend it to be joined in an indictment brought under §2113(d). Moreover, under the facts of these cases there are no distinguishable elements between the §2113(d) charges and the §924(c) charges. Therefore, the judgments of convictions as to §924(c) are duplicitous and should be vacated.

Respectfully submitted,

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